BEFORE THE

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

DEPARTMENT OF INDUSTRIAL RELATIONS

STATE OF CALIFORNIA

In the Matter of the Appeal of: CITY OF SACRAMENTO, DEPT. OF PUBLIC WORKS 921 10th Street, Rm. 400 Sacramento, CA 95814 Employer	Docket No. 93-R2D1-1947 **DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having granted the petition for reconsideration filed in the above-entitled matter by Employer, makes the following decision after reconsideration.

JURISDICTION

On June 8, 1993, a representative of the Division of Occupational Safety and Health (Division) conducted an inspection at a place of employment maintained by City of Sacramento, Department of Public Works at 921 10th Street, Sacramento, California (the site). On July 28, 1993, the Division issued to Employer a citation alleging a serious violation of section[1] 3314(a) [cleaning, repairing, servicing, or adjusting equipment]. No civil penalties were proposed because Employer is a public entity.

Employer filed a timely appeal from the citation, contesting the existence of the violation. After a hearing, an administrative law judge of the Board (ALJ) issued a decision dated September 28, 1994, denying Employer's appeal.

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[1] Unless otherwise specified, all section references are to Title 8, California Code of Regulations

On November 2, 1994, Employer filed a petition for reconsideration. The Board granted Employer's petition on December 5, 1994, and stayed the decision of the ALJ pending a decision on the petition for reconsideration. The Division filed an answer on December 7, 1994.

EVIDENCE

In making this decision, the Board relies upon its independent review of the entire evidentiary record in this case, including the tape recordings of the hearing and each exhibit admitted into evidence. The Board has taken no new evidence and adopts and incorporates by this reference the "Summary of Evidence" set forth on pages two through six of the ALJ's decision.

An employee of Employer was injured while trying to remove a refuse bin that had become stuck in a raised position in the hopper of a rear-loading refuse truck. The employee and his co-worker had attached the refuse bin to the coupling on the back of the truck. The employee then used a handle on the side of the truck to activate the truck's hydraulic system to raise the bin into the hopper. After dumping the contents of the bin into the hopper, the employee again used the handle to activate the hydraulic system, this time to lower the bin, but the bin became stuck. To free the bin from its stuck position, the employee grabbed the bin with his left hand, and the coupling with his right hand. The bin broke free and pinched the employee's little finger between the area on the coupling he had held, and the end of the bin. The employee's finger was amputated as a result.

Employer had instructed its employees that if a bin became stuck, to grab the outer wheels at the bottom of the stuck bin and pull the bin downward to free it. If this did not work, the employee was instructed to return the truck to the maintenance yard for the mechanics to dislodge the bin. Employer had also instructed the employees to stay clear of, and never to place their hands in, the hopper area while it was activated.

Movement of the bin was required to dislodge it from its stuck position. The ALJ found that the evidence presented by the Division established by a preponderance a violation of section 3314(a) because not only did the employee, in freeing the stuck bin, fail to use an extension tool, he also failed to use the method or means required by Employer. The ALJ found that the violation was properly classified as serious stating, among other reasons, "Since the employee was the lead person at the site . . . and was responsible for the violation, his

knowledge of the violation is imputed to Employer. . . . A serious violation of section 3314(a) is therefore established."

The ALJ further found that the independent employee action defense was not applicable "because the employee involved in the violation, was the lead person in charge of the refuse collection crew while at the refuse collection site."

The evidence relied upon by the ALJ in determining that the injured employee was a "lead" employee was based on testimony and documentary evidence. Specifically, Employer submitted job descriptions for a Sanitation Worker I and II. The injured employee was a Sanitation Worker II and one of the duties of this classification was "supervising the work of other crew members." In addition, the injured worker characterized his position as the senior person for the crew. He also testified that he had not been responsible for the safety training of the Sanitation I co-worker, nor was it his responsibility to discipline the co-worker for any safety violations.

ISSUES

1. Was a violation of section 3314(a) established?
2. If a violation was established, was the independent employee action defense available?

FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION

Section 3314(a) provides:

"Machinery or equipment capable of movement shall be stopped and the power source de-energized or disengaged, and, if necessary, the moveable parts shall be mechanically blocked or locked out to prevent inadvertent movement during cleaning, servicing or adjusting operations unless the machinery or equipment must be capable of movement during this period in order to perform the specific task. If so, the employer shall minimize the hazard of movement by providing and requiring the use of extension tools (e.g., extended swabs, brushes, scrapers) or other methods or means to protect employees from injury due to such movement. Employees shall be made familiar with the

safe use and maintenance of such tools by thorough training . . . ." [Emphasis added.]

In this case, the stuck bin necessarily had to be capable of movement to be released. Therefore, the provisions of 3314(a) specifying that machinery be stopped and the power source de-energized or disengaged, and that, if necessary, the moveable parts be mechanically blocked or locked to prevent inadvertent movement, do not apply. When they do not apply, section 3314(a) requires the employer to minimize the hazard of movement by providing and requiring the use of extension tools (e.g., extended swabs, brushes, scraper) *or* other methods or means to protect employees from injury due to such movement. Section 3314(a) specifically requires that employees are to be made familiar with the safe use of such tools or alternative methods by thorough training.

1. A Violation of Section 3314(a) Was Not Established

In Sacramento Bag Manufacturing Co., OSHAB 91-320 Decision After Reconsideration (Dec. 11, 1992), the Board interpreted section 3314(a) to allow the Division the discretion, based upon its inspection of the employer's premises, to cite for failing to either (1) stop and de-energize or disengage a machine, or (2) provide and require the use of extension tools, during cleaning, servicing, or adjusting operations. The Board held that:

> "If the Division has cited an employer for failing to stop and lock out the machinery, the employer may appeal and allege that the machinery must be moving in order to perform the task. Because this language is an exception (signified by use of the word "unless" in the language of the order) to the general requirement in Section 3314(a) of stopping the [machinery], the employer has the burden of establishing at the hearing that the exception applies. Then the employer also must prove that extension tools (or similar methods) were provided to employees, they were trained to use them, and the use of such tools was required by the employer.
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> By alleging in the instant citation that extension tools were not used, the Division effectively conceded that the exception applies (i.e., the machinery had to be capable of movement to be cleaned, serviced or adjusted). In such a case, the employer need only prove on appeal the elements of the exception."

In the present case, the Division cited Employer for not requiring that extension tools or other methods or means be used in freeing the stuck bin. Under Sacramento Bag Manufacturing, the Division, by alleging this, effectively conceded that the exception to section 3314(a) applies. Employer need only prove on appeal the three elements of the exception. Functionally then, the burden of proof shifts to Employer to prove that safe methods or tools were provided to employees; they were trained to use them; and Employer required use of the methods or tools.

The Board finds that Employer met all three of the qualifying factors for minimizing hazards to employees stated in the exception to section 3314(a). First, as the ALJ found and the Division conceded, the machinery had to be capable of movement in order to free the stuck bin. Therefore, Employer could not stop and lock out the machinery.

Second, while Employer did not provide an extension tool,[2] Employer did provide methods or means to free the stuck refuse bin. Specifically, an employee was required to grab the elevated bin's outer wheels and pull the bin downward to free it. If this did not work, the employees were instructed to return the truck to the maintenance yard for the mechanics to dislodge it. The Board finds Employer's methods of freeing stuck bins were "similar methods" referred to in Sacramento Bag Manufacturing and, therefore, acceptable alternatives to extension tools. The methods provided not only protection equal to the use of an extension tool, but were more protective because the employees were completely removed from the zone of danger.

Third, Employer provided thorough training regarding its methods for freeing stuck bins. The injured employee testified that he received training from Employer on how to operate the rear loading mechanism safely. In 1991, the injured employee had also received retraining in the operation of the rear loading refuse truck. He had also attended Employer's tailgate meetings where safety and operation of the rear-loading truck had been discussed, including the two methods for freeing a stuck bin. Employees were given written warnings and suspensions for not following Employer's methods for freeing stuck bins.

The injured employee testified both on direct and cross-examination that Employer provided a safe method for freeing stuck bins; that he was adequately trained; and Employer did require the use of the safe methods. The Board finds that the evidence supports a

[2] The ALJ found that no usable extension tools existed at the time of the hearing and that the Division was unable to satisfactorily explain how an extension tool would effectively operate to free a stuck bin.

finding that Employer met its obligations under section 3314(a). The decision of the ALJ is reversed. No violation was established and the issue of classification is moot.

This finding overturns the ALJ decision in which not only was a violation established, but the ALJ found that it was properly classified as serious. The Division classified the violation as serious when it issued the citation because knowledge of the violation was imputed to Employer through the injured employee. The ALJ sustained both the classification and the violation on the grounds that the injured employee "was the lead person in charge of the refuse collection crew while at the refuse collection site[.]" and that ". . . knowledge of the employee is imputed to employer." Additionally, the ALJ's decision found that the independent employee action defense was not applicable since the injured employee was a "lead" person.

The status of the injured employee is a threshold issue as to both the classification of the violation and the applicability of the independent employee action defense. The Board does not find that the employee was a "lead" person, and on that basis overturns the ALJ's decision. The Board's analysis of what constitutes a supervisor, lead person, and foreman is set forth in a subsequent section of this decision.

2. If A Violation Of Section 3314(a) Had Been Established, The Affirmative Defense Of Independent Employee Action Would Be Applicable

The Board's determination that Employer did not violate section 3314(a) disposes of the issue of Employer's liability. Because the application of the affirmative defense of independent employee action is employed often, the Board will proceed to address this issue to better guide the parties who appear before it. This will also provide a reviewing court, if any, with a record of the Board's analysis on this point under the facts of this case.

The independent employee action defense has a five-part test as set forth in Mercury Service, Inc., OSHAB 77-1133, Decision After Reconsideration (Oct. 16, 1980), and the ALJ and the Board find that Employer adequately met all the elements of the test.[3] Employer

[3] Employer met the Mercury Service, Inc. Independent Employee Act Defense as follows: (1) The employee was experienced in the job being performed. Here, the injured employee had worked with rear-loading refuse trucks for 13 years. (2) Employer had a well-devised safety program which included training employees in matters of safety respective to their particular job assignments. Here, Employer provided training to the injured employee before he worked with the rear-loading refuse truck, and later

established that (1) the injured employee had experience in the job being performed; (2) it had a well devised safety program; (3) it effectively enforced the safety program; (4) it had a policy of applying sanctions for violations; and (5) the employee causing the infraction knew he was violating the safety requirement.

Although Employer met all of the requirements of the Mercury Service, Inc. Independent Employee Act defense test, the ALJ found that the defense did not relieve Employer from liability because the ALJ determined that the injured employee was the lead person in charge at the work site and was the employee responsible for the violation. This finding is consistent with the decisions following Mercury where the defense is not applicable if the injured employee is a lead person, foreman, or a supervisor. Unfortunately, it is not a simple matter of looking to an employee's title to determine the applicability of the independent employee act defense. Many job descriptions and/or titles do not have universally agreed upon definitions. More importantly, a title alone is not sufficient to determine if an employee has sufficient authority at a work site to impute his knowledge of safety violations to Employer.

In 1981 in Pacific Gas and Electric Company, OSHAB 80-067, Decision After Reconsideration (Jan. 28, 1981), a case cited in the ALJ decision, the Appeals Board held that since the injured employee was the lead person at the site, and he was responsible for the violation, his knowledge of the violation is imputed to the employer, and therefore the defense was not available.

Then in Western Pipeline, OSHAB 80-1426, Decision After Reconsideration (Sept. 28, 1981), the Board held that the purpose of the Act would not be served if the independent employee action defense was applied in situations involving foremen and supervisors. The Court of Appeals agreed with this analysis in Davey Tree Surgery Co. v. Occupational Safety & Health Appeals Board (1985) 167 Cal. App.3d 1232, and said the defense was not available if the employee

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provided re-training to the employee in 1991 and required that the employee attend tailgate meetings on operation and safety when working with rear-loaders. (3) Employer effectively enforced the safety program. Here, Employer wrote-up or suspended employees for not following the safety program. (4) Employer had a policy of enforcing sanctions against employees who violated the safety program. Here, Employer has an incremental procedure for disciplining employees for infractions of safety rules. After an employee was verbally reprimanded or written up, the sanctions extend to suspensions of one day, two days, five days, ten days, fifteen days, twenty days, and then termination. Progressive sanctions were applied in relationship to the severity and circumstances of a violation. (5) The employee caused a safety infraction which he or she knew was contra to the Employer's safety requirement. Here, the injured employee testified that he knew removing the stuck bin in the manner he did was contrary to Employer's required methods.

committing the safety violation was a supervisor or foreman. In Davey, the court set forth a test to determine whether an employee is a foreman or supervisor:

> Although there is no established definition of "supervisor" for purposes of the exception to the independent-act rule, the Board's stated rationale for the exception has included the following statements, which, in themselves, comprise a working definition of the term: "Fore[persons] and supervisors are responsible for more than just their personal safety; *they are responsible for the safety of the workers under their supervision.* They are their employer's representatives at the work site and *directly ensure their employer's compliance with statutory and regulatory safety requirements.* At p. 1241. [Italics added for emphasis.]

The Davey test explicitly requires that the employee must have responsibility for the safety of others to be considered a foreman or supervisor.

Then in Granite Construction Company, OSHAB 84-648, Decision After Reconsideration (March 13, 1986), an employee was found to have sufficient authority to ensure compliance with the employer's safety rules due to the extent to which the employee was in charge at the work site. The employee, described as a "foreman of the tile crew" and as a "leadman," was responsible for controlling the work at the site; he was responsible for bringing the work materials to the site, and the work did not begin until he instructed the crew on what was to be done. The Board also noted that the definition of foreman does not necessarily turn on the manner in which an employee is paid or whether he is personally empowered to fire other employees.

In 1987 in Bilardi Construction, Inc., OSHAB 84-308, Decision After Reconsideration (July 27, 1987) the Board held that although the powers and duties attached to each job title must be considered, whether a crew leader or a leadman is a member of management depends on his delegated authority. There a union-represented employee had been placed in charge of excavation work to be done by two laborers and had to decide whether to shore, slope, or bench an excavation. This reliance was placed on the employee by management to ensure compliance with regulatory safety requirements. Therefore, the employee was the representative of management at the site, despite his job title and union affiliations. Employer was barred from asserting the independent employee action defense.

In Chevron USA, Inc., OSHAB 89-283, Decision After Reconsideration (Feb. 8, 1991), the evidence showed that the crew leader who had caused the safety violation had safety authority for the area under his control. Specifically, the employee was required by the employer to conduct employee training, document safety matters, insist that the other employees obey every safety rule, and conduct safety meetings. The Board rejected the independent employee action defense because the crew leader had been made responsible by the employer for safety in the work place.

Then in Contra Costa Electric, Inc., OSHAB 90-470, Decision After Reconsideration (May 8, 1991), the Board found that it is the cumulative nature of an employee's responsibilities, rather than the traditional power to hire and fire, which determines one's standing as a foreman or supervisor for purposes of the Occupational Safety and Health Act of 1973.

The Board recently considered the subject in Jerry's Electrical Service, OSHAB 91-1287, Decision After Reconsideration (July 29, 1993). In this case an employee was injured when the extension ladder he was using to install overhead lighting slipped out of position. The injured employee testified that he was "in charge" of the work of the crew at the site. He ordered the other employees to work outside the building shortly before the accident, and he was empowered by employer to determine the means to be used to reach overhead conduits and fixtures. The Board held at page 3 that:

> "To be a foreman or supervisor for these purposes, an employee need not have a supervisory or managerial job title, or the power to "hire and fire" subordinate employees. Rather, the focus is whether the employee has been delegated sufficient authority to ensure that other employees follow the employer's and the government's safety rules."

If the Board determined that a violation did occur, the Board would not have denied Employer the opportunity to defend on this set of facts. The Board must determine if the injured employee, who was a Sanitation Worker II, meets the supervisory/leadman exception to allow the independent employee action defense. The ALJ cited both Mercury Service, Inc., supra, OSHAB 77-1133, Decision After Reconsideration (Oct. 16, 1980) and B & B Roofing, OSHAB 85-515, Decision After Reconsideration (July 27, 1987), and found that the independent employee action defense was not established because the injured employee was a leadman with supervisory responsibilities for

safety purposes, and that the employee worked as a crew leader over employees in the class of Sanitation Worker I.

The qualifications in the job description provide that the employee must have knowledge of "the safe use, operation and maintenance of refuse collection equipment," and the ability to "supervise the work of other crew workers." The injured employee's co-worker's job title was "Sanitation Worker I." The sanitation worker I job description provided that the employee was under "direct supervision" of a Sanitation Worker II or III.

The previous Decisions After Reconsideration have set forth principles and tests to determine whether or not an employee is a supervisor or a foreman and a major focus of those tests is on the employee's responsibilities for the safety of others. Under the specific facts of this case the Board determines that the injured employee was not delegated adequate authority to make him a representative of management at the site. Beyond the job description, there is no evidence that the injured employee, in this case, exercised authority to enforce safety requirements. During cross-examination the injured worker testified that he had not been responsible for the safety training of his co-worker nor had it been his responsibility to discipline him for safety violations. When the documentary evidence of the job description of a Sanitation II worker is considered with the testimony of the worker himself, the Board finds that the injured employee was not a foreman for the purpose of defeating the independent employee action defense.

DECISION AFTER RECONSIDERATION

The decision of the ALJ dated September 28, 1994, is reversed. No violation of section 3314(a) was established. However, had a violation occurred, Employer could have established the elements of the independent employee action defense to avoid liability.[4]

JAMES P. GAZDECKI, Chairman

BILL DUPLISSEA, Member

BRYAN E. CARVER, Member

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OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
SIGNED AND DATED AT SACRAMENTO, CALIFORNIA

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[4] Similarly, if a violation occurred, it properly would have been classified as general instead of serious because the injured employee's status was insufficient to impute knowledge of the violation--a requirement of a serious violation--to Employer.